in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it." We think that when the minor succeeds to the estate—which, up to the date it fell into his hands, had been in possession of the executrix—that there was a succession or transfer by operation of law within that section. We therefore think that the minor is in a position to execute the decree.

1889

UMASOONDURY DASSY v. BROJONATH BHUTTACHARJEE.

The next point is that the execution must be governed by Bengal Act VIII of 1869, and not by the present Rent Act, and that raises the question whether the mode, in which the decree was executed under the old Rent Act, was, in so far as it was a right at all that belonged to the judgment-creditor, a private right or a mere right of procedure. It is not contested that if it be a right of procedure and nothing more, the new Act applies. The old law is to be found in ss. 59, 60 and 61 of Bengal Act VIII of 1869. Section 59 lays down the procedure to be followed on sale of an under-tenure, and s. 61 closes that portion of it by stating when and when not the order of sale shall issue.

We think the right contended for by the appellant in this case, even if it existed, which we do not decide, was a mere right of procedure, and that the Judge in the Court below was right in holding that the present execution proceedings must be governed by the procedure now in force.

The result is that the appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

THE EMPRESS *v.* BAIKANTA BAURI.[o]

1889. *March* 4

False Evidence—Alternative Charges—Statement made to Police Officer investigating case—Penal Code (Act XLV of 1860), ss., 191, 193—Criminal Procedure Code (Act X of 1882) s. 161.

An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police officer investigating a case of arson, and the other having been made when he was examined as a

[o] Criminal Reference No. 2 of 1889, made by R. F. Rampini, Esq., Sessions Judge of Burdwan, dated the 26th of January 1889.

1889

THE EMPRESS v. BAIKANTA BAURI.

witness before the Joint Magistrate when the case was being inquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police officer was engaged, was to the effect that an inquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge who disagreed with the verdict of acquittal : *Held*, that the verdict was right.

Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police officer was a statement in answer to questions put to the accused by the investigating police officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained.

Held, further, that in such a case it is also necessary for the prosecution to establish that the police constable was making an investigation under Chapter XIV of the Criminal Procedure Code.

THIS was a reference made by the Sessions Judge of Burdwan under the following circumstances:—

On the 24th November 1888, in the course of a trial before the Joint Magistrate of Ranigunge, in which one Rambandhu Ghose and others were charged with mischievously destroying a house by fire, the accused in this case, Baikanta Bauri, and two other persons, named Dinonath Ojha and Kalpa Bauri, gave evidence, during the course of which they stated that they had not seen the house set fire to. The Sessions Judge, in his letter referring the case, stated that these three witnesses had previously stated to a head constable of police, who had inquired into the case against Rambandhu Ghose and the others charged with him, that they had seen the house set fire to and had given full details of the occurrence which they said they had witnessed.

The Joint Magistrate, having regard to the provisions of s. 161 of the Criminal Procedure Code under which all persons are bound to answer truly all questions put to them by a police officer relating to a case into which he is inquiring, being of opinion that the three witnesses had given false evidence either before the police officer or before him, committed them separately to the Court of the Sessions Judge to be tried on alternative charges of giving false evidence.

1889

THE EMPRESS v. BAIKANTA BAURI.

Three separate trials were held by the Sessions Judge with the aid of the same jury, which resulted in the jury acquitting Baikanta Bauri and convicting the other two. The Sessions Judge disagreed with the verdict of acquittal, and referred this case to the High Court, giving his reasons for so doing in his letter of reference as follows:

"I tried the case of Dinonath Ojha on the 24th instant, with the assistance of a jury, and the jury unanimously found the accused guilty of the offence with which he was charged. I proceeded, on the 25th instant, to try the case of Baikanta Bauri with the assistance of the same jury, and though the circumstances of his case were similar to those of Dinonath Ojha, and though the evidence in the two cases were exactly the same, except that in Baikanta Bauri's case one additional witness was examined by the prosecution, and no witness was cited for the defence, whereas one witness was cited on behalf of Dinonath Ojha, the jury acquitted the accused. I at first thought that the jury acquitted Baikanta Bauri, because I had sentenced Dinonath Ojha to six months' rigorous imprisonment, and it occurred to me that this punishment may have seemed to them to be excessive. But on my proceeding, later in the day, to try, with the assistance of the same jury, the case of the third accused person, namely, Kalpa Bauri, they unanimously convicted this man, though the evidence for the prosecution was the same as the evidence for the prosecution in the case of Baikanta Bauri, with the exception that there was one witness for the prosecution less.

"I can see no distinction between the cases of these three accused persons, two of whom the jury have found guilty and one of whom the jury have acquitted. I approve of the unanimous verdict of the jury in the cases of Dinonath Ojha and Kalpa Bauri, and entirely disagree with the verdict of the jury in the case of Baikanta Bauri. I can see no reason for it whatever, and consider it to be illogical and whimsical in the extreme. I submit the records of all three cases for the inspection of the High Court and recommend that the verdict of the jury in the case of Baikanta Bauri be set aside, and that like

1889

THE EMPRESS v. BAIKANTA BAURI.

Dinonath Ojha and Kalpa Bauri, he be convicted of an offence under s. 193, Penal Code."

No one appeared on the reference.

The charge framed against the accused together with the nature of the evidence admitted during the trial before the Sessions Judge, and the charge of the Sessions Judge to the jury, appear sufficiently from the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

The Sessions Judge of Burdwan, dissenting from the verdict of acquittal of the jury, has referred this case under s. 307 of the Code of Criminal Procedure. The charge against the accused was under s. 193 of the Indian Penal Code, of giving false evidence, and is to the following effect: "That he, on or about the 31st day of October 1888, at Purulia, Thannah Ranigunge, in the course of the inquiry into the case of arson of *Empress* v. *Rambandhu Ghose* and others, before Anadinath Bundopadhya, head constable of outpost Faridpore, stated in evidence that he had seen Rambandhu Ghose set fire to the house, and that he, on or about the 23rd day of November 1888, at Bharra, Thannah Assensole, in the course of the inquiry into the case of arson—*Empress* v. *Rambandhu Ghose and others*—before the Sub-Divisional Magistrate of Ranigunge, stated in evidence: "I did not see anybody set fire to the house. I was a mile off at home," one of which statements he either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

The evidence that was given in this case does not show which of these statements is false, but the Sessions Judge is of opinion that the two statements are contradictory, that one of them must be false, and therefore that the accused should be found guilty under s. 193 of the Indian Penal Code. Now the statement made by the accused on the 31st day of October 1888 was made before one Anadinath Bundopadhya, head constable of an outpost called Faridpore. It appears to us that the Sessions Judge, in his charge to the jury, has not at all referred to the question whether, if this statement be false, the accused would be guilty of giving false evidence under s. 193. In his charge to the

jury he says: "The jury had therefore to consider (1) whether he had made such a statement before the head constable; (2) whether he had made such a statement before the Joint Magistrate; and (3) whether the two statements were so, contradictory as that one or other of them must be false, and both could not be true." Then, in another part of his charge, he says: "I then said on this evidence the jury must make up their minds on the three points previously alluded to. If they believed the witnesses and thought the two statements said to have been made by the accused were directly contradictory, so that both could not be true, the jury would be justified in convicting him under s. 193." It seems to us that the Sessions Judge has overlooked a very important point in the case, *viz.*, accepting that the statement made before the head constable was untrue, whether the accused could be found guilty of giving false evidence under s. 193. Section 193 says: "Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Now it is evident that the statement before the head constable, if it at all comes within the section, must fall within the last part of it, *viz.*, "whoever intentionally gives or fabricates false evidence *in any other case*, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Section 191 of the Indian Penal Code says: "Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence." Now the question is whether in this case the statement before the head constable was such as would bring it within the definition of false evidence

1889

THE EMPRESS v. BAIKANTA BAURI.

given in s. 191 of the Indian Penal Code. The answer to this question will depend upon the construction we put upon s. 161 of the Code of Criminal Procedure. The second paragraph of that section declares that a person examined by a police officer under the provisions of it "shall be bound to answer truly all questions relating to such case put to him by such officer." Before an accused person can be held guilty under s. 193, it is, therefore, necessary that it should be shown by the evidence that the statement which is set out in the charge was a statement in answer to questions put by the investigating police officer to the accused. That this statement was made in answer to any question put by the investigating police officer is not established by any evidence. The head constable before whom this statement was made only says: "I examined the accused Baikanta Bauri as a witness in that case. He came to the outpost with the complainant. I examined him on the 31st October. I wrote down what he said. I wrote down exactly what he said. I produce the record of his statement, exhibit C." But he does not say that this statement, *viz.*, exhibit C, was in answer to any questions put by him to the accused. There is no other witness to establish that fact. That being so we cannot say that the statement in question is covered by paragraph 2 of s. 161 of the Code of Criminal Procedure. It is true that the record of the statement is headed: "On being questioned said;" but that would be no evidence of the fact that the accused was questioned and in answer to a question the statement was made, until that fact was proved by oral evidence. The statement in question is therefore one which upon the evidence we find was made by the accused to the head constable, Anadinath Bundopadhya. Upon the establishment of this fact alone, without any proof that the statement was in answer to questions put by the head constable, we are of opinion that the accused cannot be convicted of giving false evidence under s. 193 even if that statement be proved to be false. This is the main ground upon which we think that the verdict of acquittal is correct, but we desire also to point out that the evidence in this case is very meagre upon another point which it was necessary for the prosecution to establish, *viz.*, that the aforesaid head constable, Anadinath Bundopadhya, was making,

1889

THE EMPRESS v. BAIKANTA BAURI.

an investigation under Chapter XIV of the Criminal Procedure Code. The charge, set out above, states that this statement before the head constable was made in the course of an inquiry in a case of arson of *The Empress* v. *Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhya was making an inquiry under Chapter XIV, when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy* v. *Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, *viz*, arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him and direct his release from custody.

H. T. H. *Acquittal upheld.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

1889

January 14.

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HEM CHUNDER CHOWDHURY (PLAINTIFF).

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HAFIZ MAHOMED ALI KHAN (PLAINTIFF).*

Civil Procedure Code, 1882, *s.* 244—*Representative of judgment-debtor—Purchaser at execution sale—Private Purchase—Limitation Act*, 1877, *Art.* 179—*Application not in accordance with law—Application for execution by Benamidar—Purchase* pendente lite.

The defendants Nos. 2, 3 and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending one *K D* took out execution of a money decree which he had obtained in 1871, against defendant No. 3, and put up for sale the mehal Olipore which was purchased by the father

* Appeals from Original Decrees, Nos. 103 and 104 of 1887, against the decrees of Baboo Hemango Chunder Rose, Subordinate Judge of Mymensingh, dated the 26th of February 1887.